(2)

Supreme Court, U.S.
FILED

AND BRIEFS

No. 041426 APR 23 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Mary Catherine Baur,

Petitioner

v.

Pennsylvania State Civil Service Commission
(Department of Labor & Industry),

Respondent(s)

Appendix to
Petition For Writ Of Certiorari
To The Commonwealth Court of Pennsylvania

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Mary Catherine Baur
700 Mollbore Terrace
Philadelphia, PA 19148-5034
(215) 389-4471

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARY CATHERINE BAUR,	:	No. 196 EAL 2004
	:	
Petitioner	:	
	:	Petition for Allowance of
	:	Appeal from the Order of
v.	:	the Commonwealth Court
	:	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF LABOR AND INDUSTRY),	:	
	:	
	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 24th day of November, 2004, the Petition for Allowance of Appeal is **DENIED.**

(Seal)
TRUE COPY FROM RECORD

Attest: November 24, 2004

/s/
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania
Eastern District

Appendix A

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 11, 2005

Ms. Mary Catherine Baur
700 Mollbore Terrace
Philadelphia, PA 19148-5034

Re: Mary Catherine Baur
v. State Civil Service Commission
(Department of Labor and Industry)
Application No. 04A694

Dear Ms. Baur:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on February 11, 2005 extended the time to and including April 23, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by
/s/
Heather Trant
Case Analyst

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur, Petitioner :

v. :

State Civil Service Commission (Department of Labor and Industry), : No. 1613 C.D. 2003 : Submitted: February 20, 2004

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 1, 2004

Mary Catherine Baur (Baur) petitions for review of the order of the Pennsylvania State Civil Service Commission (Commission) that granted the Pennsylvania Department of Labor and Industry's (Department) motion to dismiss Baur's challenge to her non-selection for promotion to a position as a Workers' Compensation Judge (WCJ) in Allentown, Pennsylvania.

On December 9, 2002, the Commission certified Employment List Number 19290 to the Department for the WCJ position in Allentown. The top three examination scores on the list were 105, 100, and 90. Nine individuals including Beverly Doneker (Doneker)[1] obtained a score of 90 or above. Baur scored a 75. On February 10, 2003, the Department appointed Doneker to the position.

On February 2, 2003, Baur appealed her non-selection to the Commission. She alleged that her non-selection was the result of

---

[1] Doneker is an indispensable party to this action.

discrimination on the basis of political opinions/affiliations, age, sex, violation of Civil Service Act/Rules, and other non-merit factors. On February 27, 2003, the Commission granted Baur a hearing pursuant to Section 951(b) of the Civil Service Act (Act)[2], 71 P.S. Section 741.951(b). Doneker requested that she participate as a party by letter dated March 12, 2003.

On April 18, 2003, the Department moved to dismiss and alleged that because Baur did not achieve one of the three highest scores on the examination and, in fact, was sixteenth on a list of twenty-two candidates, she was not eligible for selection to the position of Workers' Compensation Judge under the "Rule of Three" set forth in Section 601 of the Act, 71 P.S. Section 741.601.[3] Because Baur was not eligible for selection to Workers' Compensation Judge in Allentown pursuant to Section 601, the Department asserted that it was not permitted to appoint her to that position. The Department also asserted that it acted legitimately and in a non-discriminatory manner.[4]

---

[2] Act of August 5, 1941, P.L. 752, *as amended*. This Section was added by the Act of August 27, 1963, P.L. 1257.

[3] Section 601 of the Act provides in pertinent part:

> Whenever a vacancy is likely to occur or is to be filled in the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. Unless the appointing authority elects to follow one of the alternative procedures provided for in this act, or unless there is in existence a labor agreement covering promotions in the classified service, in which case the terms and procedures of such labor agreement relative to the procedures for promotions shall be controlling, the director shall certify to the appointing authority the names of the three eligibles who are highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority.

[4] Doneker indicated by letter that she joined the motion.

BEST AVAILA

By order mailed June 24, 2003, the Commission granted the motion and dismissed Baur's appeal:

> [T]he documents attached to the appointing authority's motio include Exhibit 2, the State Civil Service Commissio Certification of Eligibles' List, which was issued on Decemb 9, 2002, and that was used to select the successful candidate fo the contested position. The Commission may take offici notice of this list since the selection of Ms. Doneker was lat audited and approved by the Commission and a copy of thi certification list is, therefore, also found in the Commission' own files.... This certification list plainly establishes tha appellant's [Baur] score '75' was such that she could not hav been selected for this position as a matter of law, since she wa not included within the group of candidates who were availabl to be considered within the rule of three....
>
> Since appellant [Baur] was not, as a matter of law, in actua competition with Ms. Doneker for selection to this position, sh lacks standing to challenge her non-selection on the basis of a claim of discrimination. She is simply not a 'person who i aggrieved' within the meaning of Section 951(b) of the Act, 7 P.S. Section 741.951(b). Accordingly, this appeal is properly dismissed and the record closed in this matter. (Footnote and citations omitted).

State Civil Service Commission Order, June 24, 2003, at 1-2. On July 17, 2003, the Commission denied Baur's motion to vacate the June 24, 2003, order.

BLE COPY

Baur contends[5] that the failure to appoint her as a WCJ violated Section 951(b) of the Act, 71 P.S. Section 951(b). Baur asserts that the Allentown list from December 2001, indicated that Attorney Examiner Mark Harrison had a score of 75 or lower but was promoted and transferred to the Philadelphia Office where he could not initially be promoted "because there would have been too many complaints filed to contest, based upon his score." Baur's Brief at 11. Baur argues that the Department has perpetuated the discriminatory practice of promoting male attorney examiners but not promoting female attorney examiners.[6]

Baur also argues that she is aggrieved because the position was first posted on Jobnet, an internal bidding procedure of the Commonwealth and neither Doneker nor T.W. Knox, who scored 100 on the test, were Commonwealth employees at the time.

It is difficult to relate, exactly, Baur's arguments to the Commission's order. The Commission dismissed the appeal because Baur's test score was not high enough to qualify for consideration. Her score was not one of the three highest scores. Section 602 of the Act, 71 P.S. Section 741.602, provides in pertinent part: "If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the highest ranking available persons on the certification of eligibles."

In addition, the Commission's regulation, 4 Pa.Code Section 97.11(a), provides:

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5 Our review is limited to determination of whether constitutional rights have been violated, error of law was committed, or necessary findings of fact were unsupported by substantial evidence. McGuire v. Department of Aging, 592 A.2d 830 (Pa.Cmwlth. 1991).

6 In the case before this Court, Doneker, the person appointed to the position is a woman.

Right of choice in making appointments and promotions. T rule -of-three applies when making selections fr employment and promotion lists. If the appropriate contains fewer than three eligibles, the Director may, up request of the appointing authority, certify candidates fr other appropriate lists to ensure the appointing authority has least three available eligibles from which to choose.

Here, it is undisputed that Baur's score did not rank among th top three examination scores, which were 90 or higher. Therefore, th Department could not have considered her for the position. The Commission did not err when it granted the Department's motion to dismiss.[7]

Doneker requests this Court award her attorneys' fees pursuan to Pa.R.A.P. 2744[8]. Doneker argues taht Baur's petition for review is frivolous because it has no basis in law or fact and does not present a justiciable question for review becaue the Rule of Three is a well settled principle of law and Baur does not argue that her score was on of the three highest.

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[7] In the argument section of her brief, Baur argues that the Commission abused it power in adjudicating her complaint becaus she prepared for a hearing, prepared a pre-hearing conference memorandum, andprepared for a pre-hearing conference which were ultimately canceled, and that her constitutional rights were violated because she was not allowed ten days to respond to the motion to dismiss. Baur failed to set forth these issues in her statement of questions involved. Therefore, these issues are waived. Coraluzzi v. Commonwealth, 524 A.2d 540 (Pa. Cmwlth. 1987).

[8] Pa.R.A.P. 2744 provides in pertinent part:

"In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages a may be just, including (1) a reasonable counsel fee...if it determines that the appeal is frivolous...."

"An appeal that raises an issue that is well settled and presents no legal support is frivolous.... A brief that lacks support for an argument and citation to pertinent authority is grounds to find an appeal frivolous...." Venafro v. Department of Transportation, Bureau of Driver Licensing, 796 A.2d 384, 388 (Pa. Cmwlth. 2002).

Here, Baur ignores the well settled law regarding the Rule of Three and the fact that she did not score high enough on the test to be considered for the WCJ position. She does not present legal support for her argument. This Court agrees that Baur's appeal is frivolous and that Doneker is entitled to an award of attorney's fees.

Accordingly, this Court affirms and Doneker's request for the assessment of reasonable counsel fees against Baur is granted. Doneker is directed to file a bill of costs pursuant to Pa.R.A.P. 3751.[9]

BERNARD L. McGINLEY, Judge

Judge Simpson did not participate in the decision in this case.

---

[9] Pa.R.A.P. 3751 provides:

> A party who desires costs to be taxed under Rule 2762(b) (procedure for collection of costs on appeal) shall state them in an itemized and verified bill of costs which such party shall file with the prothonotary within 14 days after entry of the judgment or other final order.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur, Petitioner	:	
v.	:	
State Civil Service Commission (Department of Labor and Industry), Respondent	:	No. 1613 C.D. 2003

ORDER

AND NOW, this 1st day of April 2004, the order of the State Civil Service Commission in the above captioned matter is affirmed. Beverly J. Doneker's request for the assessment of counsel fees against Mary Catherine Baur is granted. Beverly J. Doneker shall file a bill of costs pursuant to Pa.R.A.P. 3751.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Catherine Baur,	:	
Petitioner,	:	
v.	:	
	:	
State Civil Service Commission	:	
(Department of Labor and Industry),	:	No. 1613
Respondent.	:	C.D. 2003

ORDER

AND NOW, this 4th day of May, 2004, after review of the itemized bill of costs submitted by Indispensable Party, Beverly J. Doneker, by and through her attorneys, Tallman, Hudders & Sorrentino, P.C., this Court approves a total of $4,255.50 with cost of printing the brief of $49.00 and counsel fees of $4,206.50. The paralegal hourly rate contained in the bill of costs is reduced to $65.00. The paralegal total hours is reduced by .4 hours. The attorney total hours is reduced by 3.3 hours.

BERNARD L. McGINLEY, Judge

Certified from the Record
May 5, 2004
and Order Exit

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION
P.O. Box 569
Harrisburg, PA 17108-0569

July 17, 2003

(717)783-2924
FAX (717)772-5120

Ms. Mary Catherine Baur
914 Snyder Avenue
Apartment 1
Philadelphia, Pennsylvania 19148-2312

Re: Mary Catherine Baur v. Department of Labor and Industry
SCSC Appeal No. 23094

Dear Ms. Baur:

This is in response to your correspondence received July 9, 2003. The Commission, at its regular meeting of July 15, 2003, considered your request for reconsideration of your appeal. The Commission, after careful consideration, hereby denies your request and reaffirms its previous Order.

Sincerely,
/s/
Katherene E. Holtzinger Conner, Esquire
Chairman
MAILED: July 17, 2003
cc: Amy C. East, Esquire
Judith M. Gilroy, Esquire
Beverly J. Doneker, Indispensable Party
Aubrey Watkins

COMMONWEALTH OF PENNSYLVANIA

Mary C. Baur	:	State Civil Service Commission
	:	
v.	:	
	:	
Pennsylvania Department of Labor and Industry	:	Appeal No. 23094

Indispensable Party
Beverly J. Doneker

ORDER

AND NOW, the Pennsylvania State Civil Service Commission, having carefully reviewed the appointing authority's April 18, 2003 Motion to Dismiss, appellant's April 25, 2003 Response to Appellee's Motion to Dismiss, as well as the indispensable party's April 25, 2003 letter indicating that she joins in the Motion to Dismiss filed by the appointing authority, hereby grants the Motion.

Appellant's appeal seeks to challenge her non-selection for promotion to a position as a Workers' Compensation Judge in Allentown, Pennsylvania, a position that was filled by the selection of Beverly Doneker on February 10, 2003. However, the documents attached to the appointing authority's motion include Exhibit 2, the State Civil Service Commission Certification of Eligibles' List, which was issued on December 9, 2002, and that was

used to select the successful candidate for the contested position. The Commission may take official notice of this list since the selection of Ms. Doneker was later audited and approved by the Commission and a copy of this certification list is, therefore, also found in the Commission's own files. *Falasco v. Pennsylvania Board of Probation and Parole*, 104 Pa. Commw. 321 (1987). This certification list plainly establishes that appellant's score "75" was such that she could not have been selected for this position as a matter of law, since she was not included within the group of candidates who were available to be considered within the rule of three[1]. 71 P.S. Section 741.602.[2]

---

[1]The rule of three imposes a requirement that when making a selection from a certification list, an appointing authority must select from among the candidates who have obtained the highest three scores on the list.

[2]"If a vacant position is to be filled, an appointing authority may request the director to issue an appropriate certification of eligibles unless a labor agreement contains promotion procedures, which are inconsistent with this Act, in which case the terms of such labor agreement shall be controlling. The certification of eligibles shall be valid for sixty-workdays. If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking of available persons on the certification of eligibles."

Since appellant was not, as a matter of law, in actual competition with Ms. Doneker for selection to this position, she lacks standing to challenge her non-selection on the basis of a claim of discrimination. She is simply not a "person who is aggrieved" within the meaning of Section 951(b) of the Act, 71 P.S. Section 741.951(b). Accordingly, this appeal is properly dismissed and the record closed in this matter.

State Civil Service Commission
/s/

_____
Katherene E. Holtzinger Conner, Esquire
Chairman

MAILED: June 24, 2003

U.S. Const. art. III, sec. 2, cl. 1.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U. S. Const. amend. XIV, sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.A. sec. 1257(a). State Courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C.A. sec. 2000e-2(h). Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

PA. STAT. ANN. tit. 71

sec. 741.2. Purpose – Greater efficiency and economy in the administration of the government of this Commonwealth is the primary purpose of this act. The establishment of conditions of service, which will attract to the service of the commonwealth qualified persons of character and ability and their appointment and promotion on the basis of merit and fitness are means to this end.

sec. 741.3 (d)(2) "All positions now existing or hereafter created in the Department of Labor and Industry which are charged ...with the administration of the Workmen's Compensation Act and the Occupational Disease Act, including the positions of workmen's compensation referees ...."

sec. 741.3(e) "'Appointing authority' means the officers, board, commission, person or group of persons having power by law to make appointments in the classified service."

sec. 741.3(f) "'Position' means a group of current duties and responsibilities assigned or delegated by competent authority requiring the full-time or part-time employment of one person."

sec. 741.3(g) "'Class' or 'class of positions' means a group of positions in the classified service which are sufficiently similar in respect to the duties and responsibilities thereof that the same descriptive title may be used for each of such positions, the same requirements as to experience, knowledge and ability are demanded of incumbents, the same tests of fitness may be used to choose qualified appointees, and the same schedule of compensation may be made to apply with fairness under like working conditions."

sec. 741.3(n) "'Employment list' means a list of persons who have been found qualified by an entrance examination for appointment to a position in a particular class."

sec. 741.3(o) "'Promotion list' means a list of persons who have been found qualified by a promotion examination for appointment to a position in a particular class."

sec. 741.3(p) "'Eligible list' means an employment list, a promotion list or a reemployment list."

sec. 741.3(q) "'Eligible' means a person whose name is on an eligible list."

sec. 741.3(u) "'Promotion' means the movement of an employe to another class in a pay range with a higher maximum salary."

sec. 741.201(c) "Any person appointed as a member of the commission shall be a citizen and legal resident of the Commonwealth for a period of not less than one year who is in sympathy with modern personnel methods and the application of merit principles to public employment. No person who, within one year preceding his appointment, has been an officer of a political party shall be eligible to serve as a commissioner."

sec. 741.205. Qualifications, Appointment and Compensation of Director–"The director shall be a person who shows he is familiar with the principles and methods of personnel administration and one who is in sympathy with the application of merit principles and scientific methods to public employment. He shall be appointed by the commission and serve at the pleasure of the commissioners. His salary shall be fixed by the commission with the approval of the Governor, and he shall hold no other paid public position.

sec. 741.206. Powers and Duties of Director–"Under the direction and supervision of the commission, the director, except as otherwise provided in this act, shall direct and supervise the administrative work of the commission. The director shall have power and the duty–...

(5) To administer and make effective the provisions of this act and of the rules made thereunder, including those relating to the preparation and conduct of examinations, the preparation of eligible

lists, the certification of persons qualified for employment, te transfer, promotion, suspension, demotion, removal, furlough, leave of absence and resignation of employes, the rating of employes' services, the requiring of health examinations at the discretion of appointing authorities as a condition of initial or continued employment."

sec. 741.208. Public Hearings–"Before adopting or amending its rules, the commission shall hold a public hearing at which any citizen shall have the right to appear and be heard. Public notice of such public hearing shall be given at least seven days in advance of the hearing by posting on a bulletin board maintained in or near the commission's principal office, in a place accessible to the public during business hours, a statement of the time and place of the hearing and of the matter to be considered, also by furnishing at least twenty copoeis of such notice to the newspaper correspondents' office in the State Capitol andone copy of such notice to the Governor, each appointing authority and each member of the General Assembly. The commission may give further public notice of such hearings as it deems advisable."

sec. 741.209. Oaths, Testimony and Production of Papers–"Each member of the commission, the director, and any other employe or agent authorized by the commission, shall have the power to administer oaths in matters pertaining to the work of the commission. The commission shall have the power to secure by subpoena the attendance and testimony of witnesses and the production of books and papers. Any judge of a court of record, either in term time or in vacation, shall, upon proper application of the commission, compel the attendance of witnesses, the production of books and papers and the giving of testimony before the commission by attachment for contempt, or otherwise, in the same manner as the production of evidence may be compelled before such court."

sec. 741.210. Records Open to the Public–"The minutes of the commission shall be preserved as permanent records. The correspondence, eligible lists, other papers and records of the commission, applications, examination records, other documents

submitted by candidates and records of candidates who do not report for one or more parts of an examination shall be maintained for periods established inteh commission's records retention schedule, which may, upon publication of notice in the Pennsylvania Bulletin, be changed at the discretion of the commission tomeet the criteria and needs of the commission. The commission and its director, in its deliberations, may rely on computerized or electronically or mechanically reproduced records. On written rquest, supported by justificaiton acceptable to the director, and subject to reasonable regulation, all records of the commission shall be open to public inspection during ordinary business hours, except as herein specifically otherwise provided. The director shall take all due precautions to prevent the securing in advance by any unauthorized person of questions or other material to be used in any test unless such questions or materials are available to all competitors. The director shall prevent the identification by any examiner or other persons, where identity is concealed, of papers or work of any competitor in an examination before the papers or work of all competitors in that examination have been rated. Statements of former employers of competitors in examinations shall be considered confidential and not open to inspection.

sec. 741.501. Examinations Requisite for Appointment and Promotion–(a) "Except as otherwise provided in this act, appointments of persons entering the classified service or promoted therein shall be from eligible lists established as the result of examinations given by the director to determine the relative merit of candidates. Such examinations may be written and shall be competitive and open to all persons who may be lawfully appointed to positions within the classes for which the examinations are held, except that persons in unskilled positions shall enter the clssified service by promotion without examination provided:...

(c) The director shall prepare the proper State and district employment and promotion eligible lists:...

(d) The commission may limit competition in promotion examinations to employes in the classified service who have completed their probationary period in a class or classes designated

in the public notice of the examinations, and may permit promotiosn to be accomplished by any one of the following plans:

(1) by appointment from open competitive lists; or

(2) by achieving a place on an eligible list after a promotional examination, such examination having been given at the request of the appointing authority; or

(3) by promotion based upon meritorious service and seniority to be accomplished by appointment without examination, if the person has completed the probationary period in the next lower position and meets the minimum requirements for the higher position.

sec. 741.502. Nature of Examinations–"The director shall give examinations to establish employment and promotion lists...."

sec. 741.506. Establishment of Eligible Lists–"The director shall establish and maintain such eligible lists as are necessary or desirable to meet the needs of the service. These lists shall contain the names of those persons who have been found qulaified for and have successfully passed the examination and shall be arranged in the final earned ratings.

sec. 741.507. Duration of Eligible Lists–"The duration of an eligible list shall be fixed by the director with the approval of the commission for a period of up to four years. An existing eligible list shall terminate upon the establishment of an appropriate new list unless otherwise prescribed by the director. Appointing authorities shall utilize eligible lists from the date of their establishment until exhausted, cancelled by the commission, or replaced by more recently prepared lists. The director, with the approval of the commission, may at any time correct clerical errors occurring in connection with the preparation of any eligible list and revise the list accordingly, but no person who has been appointed as the result of certification from such list shall be displaced by such action. The commission shall have the power at any time after giving notice as

required in this act, and after a public hearing, to cancel the whole or any part of any eligible list on account of illegality or fraud in connection therewith.

sec. 741.601. Certification–Whenever a vacancy is likely to occur or is to be filled in the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. Unless the appointing authority elects to follow one of the alternative procedures provided for in this act, or unless there is in existence a labor agreement covering promotions in the classified service, in which case the terms and procedures of such labor agreement relative to the procedures for promotions shall be controlling, the director shall certify to the appointing authoirty the names of the three eligibles who are highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority. If the appropriate employment or promotion certification of eligibles contains fewer than three eligibles who are willing to accept appointment, or if there is no appropriate eligible list, the appointing authority may appoint an available eligible from the approved list or request the director to certify from such other list or lists as the director deems the next most nearly appropriate. If operational conditions of the appointing authority so dictate and it is found to be in the interest of the service to the Commonwealth, the commission may authorize selective certifications based on standards to be prescribed by the commission. Any person on any promotion or employment lsit who waives consideration for promotion or appointment need not be considered among the names from which a promotion or appoinment is to be made.

sec. 741.602. Selection and Appointment of Eligibles–If a vacant position is to be filled, an appointing authority may request the director to issue an appropriate certification of eligibles .... The certification of eligibles shall be valid for sixty-work days. If the vacant position is to be filled from an employment or promotion list, the appointing authority shall select a person who is among the three highest ranking available persons on the certification of eligibles. In making the second, third or any additional selection from the

eligibles on an employment or promotional certification, each selection shall be from among the three highest scoring available persons remaining on such certification of eligibles. After a person has been rejected three times by an appointing authority in favor of others on the same eligible list, such person shall not again be certified to that appointing authority, except upon written request from the appointing authority. Appointing authorities shall promptly report to the director the appointment of eligibles who have been certified. If a certified eligible refuses to accept an offer of employment, such refusal shall be promptly investigated by the director and, if it be found that the refusal has been made for improper or insufficient reasons, the director shall after giving ten days' notice to such person remove the eligible from the list.

sec. 741.901a. Commission to Make Periodic Audits of Employes.–The commission is hereby authorized to and is held responsible for conducting audits of changes in employment and promotions of employes in the various departments, bureaus and agencies under its jurisdiction, to assure strict compliance with this act and the commission rules and regulations.

sec. 741.905a. Prohibition of Discrimination–No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

sec. 741.951. Hearings–....

(b) Any person who is aggrieved by an alleged violation of Section 905a of this act may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing....

sec. 741.1001. Transfer of Records–All lists of eligibles previously established or certified which have not been replaced by later lists of

eligibles on the effective date of this Act, and all books, papers, records, documents, supplies, materials and equipment relating to or used in connection with any merit system in the service of the Commonwealth in effect on the effective date of this act are hereby transferred from the department, board or agency heretofore charged with the administration of such merit system to the commission on the effective date of this act.

Such lists of eligibles shall be used for appointments by the commission in the same manner as hereinbefore provided until examinations shall have been held by the commission and new lists of eligibles prepared pursuant thereto. All persons whose names remain on any existing list of eligibles shall be retained thereon for at least one year from the date when the list was established and thereafter until the list is replaced by a more recently prepared list. If any applications have been filed for an examination or any examination have been held, but no lists of eligibles established, in connection with any merit system in the service of the Commonwealth in effect on the effective date of this act, such applications and examinations transferred to the commission shall have the same force and effect as if the applications had been filed with or the examinations held by the commission.

sec. 95.42 (relating to preservation of examination records) is incidentally amended for clarification and to eliminate confusion. Eligible lists are constantly changing as things are added and removed. This process is done by computer and any eligible list that existed at any point in time is able to be reconstructed electronically thereafter. As formerly worded, sec. 95.42 implied that there is a single, unified eligible list that results from a single examination. In the age of computerized testing, this is no longer the case.

COMMONWEALTH OF PENNSYLVANIA

Sharon F. Zanotto :	State Civil Service Commission
:	
v. :	
:	
State Civil Service : Commission :	Appeal No. 24004

Sharon F. Zanotto *Pro Se*	Michele D. Rothstein Dolbin Attorney for State Civil Service Commission

ADJUDICATION

This is an appeal by Sharon F. Zanotto challenging the finding by the State Civil Service Commission[1] that she was not eligible for the position of Workers' Compensation Judge. A hearing was held September 23, 2004, in the Strawberry Square Complex in Harrisburg, Pennsylvania, before Hearing Officer Lynne M. Mountz.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the SCSC discriminated against appellant in finding her ineligible for Workers' Compensation Judge.

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[1] To avoid confusion, "Commission" will be used to indicate the adjudicatory branch of the State Civil Service Commission and "SCSC" will be used to indicate the administrative branch.

FINDINGS OF FACT

1. By letter dated July 2, 2004, appellant was advised by the SCSC that she was ineligible for the position of Workers' Compensation Judge. Comm.Ex.A.

2. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.

3. Appellant graduated from law school in May 2000. N.T. pp. 17-18.

4. Appellant was admitted to the bar of Pennsylvania on October 23, 2000. N.T. p. 19; Ap.Ex.3.

5. In late spring of 2001, appellant applied to take the Workers' Compensation Judge exam, but was found ineligible by the SCSC. N.T.p.15.

6. Appellant did not challenge the determination of ineligibility in 2001. N.T. p. 15.

7. On May 3, 2004, appellant applied to take the Workers' Compensation Judge exam pursuant to Test Announcement 2004-427, issued April 30, 2004. N.T.p. 21.

8. Test Announcement 2004-427 included the following:

Minimum Requirements:

Five years of Workers' Compensation practice before administrative agencies or equivalent experience.

Equivalent experience is defined as experience practicing before administrative agencies or courts of record on cases that involved the relationship between a person's physical or psychological impairment and his or her ability to work. This experience must have been in the capacity of one or a combination of the following:

- Presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer.

- Acting as a legal representative in judicial or quasi-judicial proceedings. (Experience assisting other attorneys in the actual hearing is considered acceptable.)

- Experience as a law clerk or opinion writer.

NOTE: If you did not work full-time in an acceptable area of the law, but you have, over several years, handled some cases that were related (e.g. social security disability, personal injury, workers' compensation, etc), your experience will be prorated to determine if you have the equivalent of five years of full-time experience. It is, therefore, very important for you to indicate on your application the number of hours you worked per week and the percentage of time you spent working in a related area of law. If you do not include this information on your application, you may be deemed ineligible.

Be sure to list your Attorney I.D. number in Block 9 of your Application for Employment/Promotion.
Ap.Ex. 6.

9. The class specifications for Workers' Compensation Judge list the Minimum Experience and Training requirements as, "Five Years of Workers' Compensation practice before administrative agencies or equivalent experience."[2] SCSC Ex.2.

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[2] A "Necessary Special Requirement" for the position requires that the candidate "[b]e an attorney in good standing before the Supreme Court of Pennsylvania." SCSC Ex. 1.

10. The Evaluation Guide used by the SCSC in determining eligibility for Workers' Compensation Judge provides, "**Only experience gained <u>after</u> graduation from an approved school of law will be considered acceptable.**" SCSC Ex.2.

11. Beginning in April 1992, appellant began working as a paralegal for Central Penn Legal Services. N.T. p. 23.

12. Part of appellant's caseload as a paralegal involved representing individuals seeking supplemental security income from the Social Security Administration. Appellant devoted approximately two days per week to this caseload. N.T. pp. 25, 31.

13. During the three years that appellant served as a paralegal for Central Penn Legal Services, she handled approximately 88 cases before the Social Security Administration. N.T. p. 26.

14. After her graduation from law school, appellant worked for two years and five months as an Attorney Examiner for the Bureau of Workers' Compensation. N.T. pp. 33, 34.

15. From October 2002 through the time of her hearing, appellant was an Unemployment Compensation Referee. N.T. pp. 34-35.

16. Patricia Eby, a Human Resource Analyst 2 with the SCSC, evaluated all of the applicants for the Workers' Compensation Judge exam in 2004 to determine eligibility. N.T. p. 46.

17. Eby found appellant ineligible for the Workers' Compensation Judge position. N.T. p. 49.

18. In making her determination of ineligibility, Eby used the job specifications and the Evaluation Guide – she did not consider appellant's gender or the number of male and female applicants for Workers' Compensation Judge. N.T. pp. 48-49, 51.

19. On May 30, 2001, Michael Smith completed a civil service application for Workers' Compensation Judge. Ap. Ex. 1.

20. The class specifications for the Workers' Compensation Judge position were the same in 2001 and 2004. SCSC Ex. 1.

21. Smith indicated on his application that he graduated from law school in May 2000. Ap. Ex. 1.

22. Smith was admitted to the bar on May 7, 2001. N.T. p. 19; Ap. Ex. 2.

23. Smith indicated on his application that the had four years and seven months experience with the Department of Labor and Industry as a Disability Hearing Officer beginning in October 1996. Ap. Ex. 1.

24. Smith indicated on his application that he had served as a Disability Claims Adjudicator 2 with the Department of Labor and Industry from June 1991 until October 1996. Ap. Ex. 1.

25. Smith indicated on his application that he had served as a Disability Adjudication Supervisor with the Department of Labor and Industry from June 1983 until June 1991. Ap. Ex. 1.

26. Smith was found eligible for the Workers' Compensation Judge position and was allowed to take the exam in 2001.[3] N.T. p. 18.

27. Smith received a final earned rating of 75.00 on the exam and appeared on the list of eligibles for Workers' Compensation Judge through August 31, 2004. N.T. pp. 56, 71; Ap. Ex. 4; SCSC 2005. Ex. 4.

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[3] Eby did not make the eligibility determination for Smith in 2001. N.T. p. 55.

28. Smith was not appointed to a Workers' Compensation Judge position and was purged from the list of eligibles on September 1, 2004. N.T. p. 56; SCSC Ex. 4.

DISCUSSION

The issue in the present appeal is whether the appellant has established that the SCSC's determination that she was ineligible for the position of Workers' Compensation Judge was the result of discrimination. An individual who is challenging an eligibility determination by the SCSC may do so only on the basis of discrimination in violation of Section 905.1 of the Civil Service Act. *Pronko v. Commonwealth of Pennsylvania, Department of Revenue*, 114 Pa.Commw. 428, 437, 539 A.2d 456, 461 (1988). Appellant has alleged discrimination based upon sex and a violation of the Civil Service Act/Rules. Comm.Ex.B. Specifically, appellant alleged that the SCSC had told her that she must be licensed to practice law for five years in order to take the Workers' Compensation Judge exam, but that a male who had been licensed for less than five years was allowed to take the exam and remains on the list. Comm. Ex. B.

In an appeal alleging discrimination, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990). In analyzing claims of discrimination[4] under Section 905.1 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 P.S. sec. 741.951(b); 4 Pa.Code sec. 105.16; *Department of Health v.*

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[4] The Act addresses both "traditional" and "procedural" discrimination. "Traditional discrimination" encompasses only those claims of discrimination based on race, sex, national origin or other non-merit factors. "Procedural discrimination" refers to a technical violation of the Act. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical noncompliance or that because of the peculiar nature of procedural impropriety that he or she could have been harmed but there is no way to prove that for certain. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (1988); 71 P.S. sec. 741.905a.

Nwogwugwu, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for its action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretext. *Id.* At 614-615. In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others similarly situated. *Nwogwugwu*, at 141 Pa. Commw. 40, 594 A.2d 851 (1991).

Appellant testified on her own behalf in support of her appeal. Appellant graduated from law school in May 2000 and was admitted to the bar of Pennsylvania on October 23, 2000. N.T. pp. 17-19; Ap. Ex. 3. In late spring of 2001, appellant applied to take the Workers' Compensation Judge exam, but was found ineligible by the SCSC. N.T. p. 15. Appellant did not challenge the determination of ineligibility in 2001. N.T.p.15.

Appellant testified that on May 3, 2004, she applied to take the Workers' Compensation Judge exam pursuant to Test Announcement 2004-427, issued April 30, 2004. N.T. p. 21. Test Announcement 2004-427 provided, in relevant part:

Minimum Requirements:

Five years of Workers' Compensation practice before administrative agencies or equivalent experience.

Equivalent experience is defined as experience practicing before administrative agencies or courts of record on cases that involved the relationship between a person's physical or psychological impairment and his or her ability to work. This experience must have been in the capacity of one or a combination of the following:

- Presiding over judicial or quasi-judicial proceedings as a judge, magistrate, or hearing officer.

- Acting as a legal representative in judicial or quasi-judicial proceedings. (Experience assisting other attorneys in the actual hearing is considered acceptable.)

- Experience as a law clerk or opinion writer.

NOTE: If you did not work full-time in an acceptable area of the law, but you have, over several years, handled some cases that were related (e.g. social security disability, personal injury, workers' compensation, etc), your experience will be prorated to determine if you have the equivalent of five years of full-time experience. It is, therefore, very important for you to indicate on your application the number of hours you worked per week and the percentage of time you spent working in a related area of the law. If you do not include this information on your application, you may be deemed ineligible.

Be sure to list your Attorney I.D. number in Block 9 of your Application for Employment/Promotion. Ap.Ex. 6.

Appellant notes that the test announcement does not require that qualifying experience be obtained after becoming licensed to practice law. N.T. p. 32. Appellant testified concerning her work experience prior to her graduation from law school – experience that she believes should be counted towards the experience necessary to be found eligible for Workers' Compensation Judge. For a period of approximately three years beginning in April 1992, appellant worked as a paralegal for Central Penn Legal Services. N.T. pp. 23, 26. According to appellant, she devoted approximately two days per week to the representation of individuals seeking

supplemental security income from the Social Security Administration. N.T. pp. 25, 31. While a paralegal, appellant handled approximately 88 cases before the Social Security Adminstration. N.T. p. 26. Appellant also testified concerning her post-graduation work experience, which she believes should be counted towards her eligibility for Workers' Compensation Judge. Appellant worked for two years and five months as an Attorney Examiner for the Bureau of Workers' Compensation. N.T. pp. 33, 34. From October 2002 through the time of her hearing, appellant was an Unemployment Compensation Referee.[5] N.T. pp. 34-35.

Appellant compared her treatment with that of Michael Smith, an individual in the same graduating class from law school as appellant. Smith was found eligible for Workers' Compensation Judge and was allowed to take the exam in 2001. N.T. p. 18. According to appellant, the test announcement from 2001 was virtually identical to the 2004 test announcement. N.T. p. 16. On May 30, 2001, Smith completed a civil service application on which he indicated that he graduated from law school in May 2000.[6] Ap.Ex.1. Smith further indicated his work experience on the application, which included the following experience with the Department of Labor

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[5] According to appellant, a person's "ableness and availability to work is an issue" in every unemployment compensation case. N.T. p. 35.

[6] Smith was admitted to the bar on May 7, 2001. N.T. p. 19; Ap. Ex. 2.

and Industry obtained before he graduated from law school:

- Four years and seven months experience as a Disability Hearing Officer beginning in October 1996.

- Serving as a Disability Claims Adjudicator 2 from June 1991 until October 1996.

- Serving as a Disability Adjudication Supervisor from June 1983 until June 1991. Ap.Ex.1.

Smith was found eligible for Workers' Compensation Judge by the SCSC and was allowed to take the exam in 2001. N.T. p. 18. Smith received a final earned rating of 75.00 on the exam and appeared on the list of eligibles through August 31, 2004.[7] N.T. pp. 56, 71; Ap.Ex. 4; SCSC Ex. 4. Appellant's basic argument is that the SCSC credited Smith's experience prior to his graduation from law school in finding him eligible to take the Workers' Compensation Judge exam in 2001, yet did not give appellant credit in 2004 for the portion of her pre-graduation work experience which she asserts, in combination with her post-graduation experience,

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[7] The list life for the Workers' Compensation Judge position is three years. SCSC Ex. 4. There is no indication in the record that Smith had applied to take the Workers' Compensation Judge exam in 2004.

meets the eligibility requirements for taking the exam.[8]

In response to appellant's presentation, the SCSC presented the testimony of Patricia Eby and Bridget Bailey. Eby is a Human Resource Analyst 2 with the SCSC. N.T. p. 46. Eby testified that she evaluated all of the candidates who applied to take the Workers' Compensation Judge exam in 2004 in order to determine their eligibility to take the exam. N.T. pp. 46-47. Eby used the class specifications and an Evaluation Guide when evaluating the candidates' eligibility for the position. N.T. pp. 47-48. The class specifications for Workers' Compensation Judge, which were the same in 2001 and 2004, list the Minimum Experience and Training requirements as "Five years of Workers' Compensation practice before administrative agencies or equivalent experience."[9] N.T. p. 47; SCSC Exs. 1, 2. The Evaluation Guide provides, "**Only experience**

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[8] At the close of the appellant's presentation, the SCSC entered a motion to dismiss the appeal for failure to establish a *prima facie* case of discrimination. N.T. p. 43. The Hearing Officer deferred ruling on the motion at the hearing. N.T. p. 45. The motion is hereby denied.

[9] The minimum requirements for the Workers' Compensation Judges are provided for in 77 P.S. sec. 2503. This section requires, in relevant part, that an individual be an attorney in good standing before the Supreme Court and "[h]ave five years of workers' compensation practice before administrative agencies or equivalent experience." 77 P.S. sec. 2503(2).

gained <u>after</u> graduation from an approved school of law will be considered acceptable." SCSC Ex. 2.

Eby testified that in determining that appellant was ineligible, Eby used the class specifications and the Evaluation Guide – she did not consider appellant's gender or the number of male and female applicants for Workers' Compensation Judge. N.T. pp. 48-49, 51. According to Eby, only experience gained after graduation from law school could be used to satisfy the experience requirement for Workers' Compensation Judge. N.T. p. 49. Eby found appellant ineligible because appellant did not have enough experience performing workers' compensation law. N.T. p. 51. Eby did not give appellant credit for her pre-graduation experience as a paralegal at Central Penn Legal Services. N.T. p. 49.

On cross-examination, Eby conceded that applicants only have access to the test announcement to determine if they are eligible to take an exam. N.T. p. 60. Eby testified that she does not believe that appellant has five years of practice before administrative agencies in the Workers' Compensation field or equivalent experience. N.T. p. 61. Eby explained that when evaluating appellant's eligibility, she gave appellant full credit for her two years and five months experience as an Attorney Examiner/Compliance Manager. N.T. p. 61. Eby did not give appellant credit for the time that she served

as an Unemployment Compensation Referee[10] because not all unemployment compensation cases deal with whether an individual has a physical or psychological impairment, which relates to their ability to work. N.T. p. 62. Eby explained that, as indicated on the test announcement, equivalent experience must be in cases involving the relationship between a person's physical or psychological impairment and their ability to work. N.T. p. 62.

Concerning Smith, Eby testified that she did not perform the eligibility determination for Smith in 2001. N.T. pp. 55, 69. Smith was placed on the eligible list for Workers' Compensation Judge on August 21, 2001 for a period of three years. N.T. p. . 74. Eby testified that she believed the determination that Smith was eligible to take the Workers' Compensation Judge exam in 2001 was erroneous. N.T. pp. 69-71. Smith was not appointed to a Workers' Compensation Judge position and his name was purged from the eligible lists on September 1, 2004. N.T. p. 56.

Bridget Bailey, a Human Resource Analyst 2 in the Test Development Unit of the SCSC, was the analyst assigned to develop the exam for Workers' Compensation Judge in 2004. N.T. pp. 77-78, 80. Bailey testified that she did so in conjunction with

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[10] Appellant did not prorate the amount of experience that she asserted was qualifying from her Unemployment Compensation Referee experience. SCSC Ex. 3.

subject matter experts. N.T. p. 78. Subject matter experts are individuals who have significant experience with the job title in question who are consulted during the development of the examination. N.T. p. 78-79. According to Bailey, an Evaluation Guide is developed in conjunction with subject matter experts for every class specification. N.T. p. 80. Bailey testified that she participated in the development of the Evaluation Guide for Workers' Compensation Judge in April 2004. N.T. p. .80. Bailey testified that the criteria in the Evaluation Guide is based upon the minimum experience and training requirements and what the subject matter experts were chosen by the Department of Labor and Industry. N.T. p. 81. Bailey also testified that there were not any substantive changes in the 2004 Evaluation Guide compared with the 2001 Evaluation Guide. N.T. pp. 80, 83. Bailey did not obseve any attempt in the development of the Evaluation Guide to cull out any potential applicants based upon their gender. N.T. p. 82.

Having carefully reviewed the evidence in the present case, we find that appellant has failed to persuade us that the SCSC's determination that she was ineligible for the Workers' Compensation Judge position was the result of discrimination. Eby credibly testified that when making determinations of eligibility for the position, she did not consider the gender of the candidates, nor did she consider the number of male and female applicants. Eby relied on the job specifications and the Evaluation Guide when determining that appellant was not eligible for the position. It is clear from the Evaluation Guide that

work experience used to find an applicant eligible for Workers' Compensation Judge must be obtained after graduation from law school. Based upon this neutral criterion, the SCSC correctly determined that appellant is not eligible for the Workers' Compensation Judge position because she did not have the requisite five years of equivalent experience after graduation and should not have been allowed to take the exam in 2004.

With regard to Smith having been found eligible and being permitted to take the exam in 2001, it appears from the record that he was found eligible in error. In accordance with the Evaluation Guide, any of Smith's experience gained prior to his graduation from law school should not have been used to find him eligible to take the Workers' Compensation Judge exam. However, because Smith was allegedly found to be eligible to take the exam in error, it does not follow that the error should be compounded by finding that appellant is also eligible to take the exam. We also note that while Smith was found eligible and appeared on certifications issued between August 2001 and August 2004, he was not hired for a Workers' Compensation Judge position and has been purged from the list of eligibles for that position. We note, however, that future test announcements for the Workers' Compensation Judge position should clearly indicate that only experience obtained after graduation from law school will be considered qualifying. Accordingly, we enter the following

CONCLUSION OF LAW

The appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Sharon F. Zanotto challenging the SCSC's determination that she was ineligible for the position of Workers' Compensation Judge and sustains the action of the SCSC in finding Sharon F. Zanotto ineligible for Workers' Compensation Judge.

State Civil Service Commission

_____
Katherene E. Holtzinger Conner, Esquire
Chairman

_____
James W. Martin
Commissioner

_____
Marwan Kreidie
Commissioner

Mailed: November 17, 2004